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JOHN F. DAVIS, CL

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 44

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,
Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY KLEPAK,
1509 Mercantile Bank Bldg.,
Dallas, Texas 75201,
Attorney for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Gerald Segal, respectfully submits his petition for writ of certiorari and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled cause of September 9, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Referee in Bankruptcy (R. 5-8) is unreported, and is printed in Appendix B hereto, *infra*, pp. 1-3.

The opinion of the District Court (R. 24-30), printed in Appendix B hereto, *infra*, pp. 3-9 is reported in 221 F. Supp. 282. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pp. 12-22 is reported in 336 F. 2d 298.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1964, (R. 38); Appendix B, *infra*, pp. 10-11. Rehearing was denied on October 12, 1964, (R. 59); Appendix B, *infra*, p. 23. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a loss carryback tax item under Title 26, 172 of the Revised Annotated Statutes is "property" as defined in Section 70(a)(5) of the Bankruptcy Act, at the time of the filing of the bankruptcy, but prior to the end of the taxable year.

STATUTE INVOLVED

The statutory provisions involved are § 70(a)(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5). The statutory provisions are printed in Appendix A, *infra*, page 1.

STATEMENT

On September 27th, 1961, a voluntary bankruptcy petition was filed on behalf of Gerald Segal and Sam Segal, copartners, trading under the firm name of Segal Cotton Products. On the same date a voluntary bankruptcy petition was

filed on behalf of Sam Segal, individually and Gerald Segal, individually. Subsequently, after the end of the year of 1961, a claim for refund resulting from a loss carryback was made in behalf of the bankrupts. As a result of said claims for refund, the trustee received the refund checks on the claims. These funds, by agreement with the attorney for the bankrupts, were deposited in the trustee's bank account to be held in escrow by him pending final determination by the Court of the rights of the parties thereto. The various claims for refund were predicated and based on the entire calendar year of 1961, including that portion of the year subsequent to the filing of bankruptcy.

The Referee in Bankruptcy entered an order on the 4th day of June, 1963, denying the claim of the bankrupts that they were entitled to the proceeds of the tax refund resulting from loss carryback claims paid by the Director of Internal Revenue. The bankrupts duly and timely filed their petitions to review the order of the Referee in Bankruptcy. The Referee in Bankruptcy filed his Certificate of Review, (R. 2-8), including his Findings of Fact, Conclusions of Law and Opinion. The above mentioned Petitions and Certificate were considered by the United States District Court for the Northern District of Texas, Dallas Division. The District Court was of the opinion that the Referee's order should be in all things affirmed and approved, which it did on August 27th, 1963, (Appendix B, infra, pp. 3-9).

The Petitioner gave notice of appeal to the Court of Appeals for the Fifth Circuit and said Court, after due hearing,

affirmed the judgment of the lower court, (Appendix B, *infra*, pp. 10-11). Petitioner then filed a Motion for Rehearing in due time, which was denied on October 12, 1964, (Appendix B, *infra*, page 23), from which Petitioner files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the decision of the Third Circuit Court of Appeals in *In Re: Sussman*, 289 F. 2d 77 (1961), Appendix C, infra, pp. 1-5, and of the First Circuit Court of Appeals in *Fournier v. Rosenblum*, 318 F. 2d 525 (1963), Appendix C, *infra*, pp. 6-10.

The conflict among the circuits was noted by Judge Bell in the opinion of the court below where he wrote: "With deference, and after careful consideration of the ruling of these respected sister courts, we find ourselves unable to follow their decisions." (R. 41), Appendix B, infra, pp. 14-15.

The specific conflict among the courts of appeals involves their interpretations of the word "property" found in Section 70(a) (5) of the Bankruptcy Act, 11 U.S.C. 110(a) (5). The conflict deals directly with an important question of statutory construction which now requires a uniform ruling on the point. *Shapiro v. U.S.*, 335 U.S. 1, 4; *Commissioner v. Bilder*, 369 U.S. 499, 501.

The impact of such a decision as that in the court below will not be narrowly confined and is apt to have serious consequences continuing into the future. Such a square and ir-

reconcilable conflict should be settled by this Honorable Court to insure finality and bring about uniformity of decisions of such an important matter among the Federal Courts of Appeals.

2. The question presented is of importance in the administration of the Federal bankruptcy and tax laws. *New York v. Saper*, 336 U.S. 328, 329. The opinion below begins by stating, "This appeal presents a question of prime importance in the administration of the Bankruptcy Act."

Settlement of the question by this court is in the public interest, since the principle of law which is made by the decision in the lower court effects all refunds in the future, including those which could result from losses incurred subsequent to the discharge of the bankrupt.

3. The decision of the court below is believed to be erroneous, and the conflicting decisions of the First and Third Circuit Courts of Appeals in *In Re: Sussman, Supra*, and *Fournier v. Rosenblum, Supra*, correct.

The Third Circuit Court of Appeals held in *Sussman, Supra*, that the right to a loss carryback adjustment is not "property" as defined in Section 70(a) of the Bankruptcy Act; and further, if "property", because of the proscription contained in the Assignment of Claims Act, 31 U.S.C.A., §203, it could not have been transferred prior to the filing of the petition in bankruptcy. The First Circuit in *Fournier v. Rosenblum, Supra*, held that the right to a loss carryback adjustment was not embraced in the concept of "property" as used in Section 70(a)(5) of the Bankruptcy Act. Thus,

prior to the decision of the court below, the law was settled that a loss carryback tax item was not "property" or a right of action which by statute vested in the trustee in Bankruptcy.

This change in accepted law as to what constituted "property" under Section 70(a)(5) of the Bankruptcy Act, 11 U.S.C.A. §110(a)(5), was not made by Congress expressly, but was construed by the court below from various distinguishable cases. Each of the cases cited by the court below in support of their application of Section 70(a)(5) of the Bankruptcy Act is distinguishable from the instant case as well as from *Sussman, Supra,* and *Rosenblum, Supra,* for the reason that in each of those cited cases the "right of action" was definite and existed prior to filing of the bankruptcy petition and only the amount was contingent. The distinguishing fact in the instant case is that there was no right of action which was in existence at the time the bankruptcy petition was filed. For the above reason, petitioner submits that the decision below is in error and that this petition should be granted because of the important question involved and the doubtful determination by the court below. *William v. Lee,* 358 U.S. 217, 218. The opposing application of Section 70(a)(5) of the Bankruptcy Act is set forth in detail in the opinion of the Third Circuit in *In Re: Sussman, Supra;* Appendix C, *infra,* pp. 1-5. In brief, the opposition of the First and Third Circuits (and of this petitioner) is that under the statute authorizing net operating loss carrybacks, the right to a loss carryback tax refund does not arise until the end of the taxable year in which the loss occurs, and

only a mere expectation can arise before the end of that taxable year. Therefore, there was no "property" which could pass to the trustee in bankruptcy from the filing of the bankruptcy petition as "property" is defined in Section 70(a)(5) of the Bankruptcy Act.

Further, if so well settled and fundamental and interpretation requires, as contended, alteration on the grounds of policy such as injustice to creditors of the bankrupt, relief is not with the courts, but with the legislature.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

.....

Henry Klepak

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to Honorable William J. Rochelle, Jr., Attorney for Respondent, whose office is in Dallas, Texas, a copy of this Petition for Writ of Certiorari received by him this ..... day of January, 1965. 1965.

Respectfully submitted,

.....

Henry Klepak
Counsel for Petitioner

APPENDIX A — STATUTE

Bankruptcy Act §70a(5), 11 USCA §110a(5), in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *"

APPENDIX B

OPINIONS AND JUDGMENT BELOW

Opinion of Referee

Section 70a of the Bankruptcy Act provides in part:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * *."

In the case of *In re Sussman*, 289 F. 2d 76 (3d Cir. 1961), the United States Court of Appeals for the Third Circuit held that a tax refund which was paid because of losses sustained during the year in which the bankruptcy petition was filed went to the bankrupt and not to the trustee. The court pointed out that there is no provision in law that bankruptcy terminates a taxable year, and said that therefore "when Sussman filed his bankruptcy petition he had no 'right of action' against the United States for the trustee to acquire under Section 70, sub. a(5) or (6)." The court found that this was a contingent claim against the United States which the court said could not be assigned.

The court conceded that the "unfortunate result" of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> "The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution."

The facts in the case at bar cannot, in my opinion, be distinguished from those of the *Sussman* case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. But *Sussman* has been severely criticized. I am persuaded by the arguments advanced against it that *Sussman* was incorrectly decided. Therefore, I have declined to follow it and have ruled that these refunds are assets of the bankrupt estates.

The articles to which I have reference are: "Property Which Passes to a Trustee—A Critical Analysis of In Re Sussman" in "Bankruptcy Law — Modern Trends" by Referee Asa S. Herzog of the Southern District of New York, 36 Journal of the National Association of Referees in Bankruptcy, page 18, and "Windfall for Bankrupts: Loss Carryback Claims Do Not Vest in Trustee" originally appearing in the Stanford Law Review and reprinted by permission in 36 Journal of the National Association of Referees in Bankruptcy, page 116. Marked copies of the issues of the Journal containing these articles are attached to this

certificate, and I shall not undertake to repeat what they say.

I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser v. Tucker*, 26 S.W. 1044, 1045; *Wheeler v. Riviera*, 49 S.W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were non assignable by reason of being claims against the United States. The Court of Appeals thought that they were non assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin v. United States*, 97 U.S. 392, 397, and *National Bank v. Downie*, 218 U.S. 345.

It seems clear that section 72 of the Bankruptcy Act does not require or even permit the inequitable result which the Court of Appeals ascribed to it while deploring the result.

Opinion of the District Court

OPINION OF THE COURT

(Number and Title Omitted)

Filed: Aug. 26, 1963

The controversy in this case grows out of a Certificate of Review to this court by Honorable Elmore Whitehurst, Referee in Bankruptcy at Dallas, Texas.

The question presented, in short, is "Does a carryback tax item under Title 26, 172 of the Revised Annotated Statutes belong to the Trustee for the benefit of creditors, or does it go to the bankrupt?

The Referee held that it belonged to the Trustee, notwithstanding the opinion in the *Sussman* case in the Third Circuit, 289 F. 2d 76. We adopt in part the Certificate of the Referee and the quotations there made by him as follows:

"In the Sussman case the court conceded that the 'unfortunate result' of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> 'The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a, have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution.'

"The facts in the case at bar cannot, in my opinion, be distinguished from those of the Sussman case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. * * * I am persuaded by the arguments advanced against it that Sussman was incorrectly decided. Therefore, I have declined to follow it, and have ruled that these refunds are assets of the bankrupt estates. * * *"

The Referee continues:

"I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser v. Tucker*, 26

S.W. 1044, 1045; *Wheeler v. Riviera*, 49 S.W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were nonassignable by reason of being claims against the United States. The Court of Appeals thought that they were nonassignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin v. United States*, 97 U.S. 392, and *National Bank v. Downie*, 218 U.S. 345."

Our view of the case is that of the Referee. Indeed, Judge Hastie, in the closing words of his opinion in the Sussman case, manifestly felt that the strict interpretation of the statute, as he viewed it, tended to smother the spirit of the law and to stand aside the urging of the principles of equity and fair play. We agree with Judge Hastie that the opinion does result in an injustice to the creditors. We think there is a better way of solving the problem.

Justice Cardoza in *Martin v. National Surety Co., et al*, 300 U.S. 588, leaves open the door for a more satisfactory light upon the question:

> "* * * the statute must be interpreted in the light of its purpose * * * An assignment ineffective at law may none the less amount to the creation of an equitable lien * * * It would be a strange construction of the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

The syllabus in the Martin case, Section 2 thereof, clearly sums up the effect of the decision:

> "2. The provisions of R. S., § 3477; 31 U.S.C. 203, declaring all assignments of any claim upon the United States 'absolutely null and void' unless made after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, are provisions for the protection of the Government, and not for the regulation of the equities of claimants growing out of regular assignments, when collection is complete and the Government's liability ended. P. 594."

The court in this case says in the Opinion:

> "We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants."

The Sussman decision, which is in conflict with the Referee's holding, we find is ably discussed and criticized in the Journal of the National Association of Referees in Bankruptcy, issue of October 1962, page 116, from which we quote:

> "The admittedly inequitable consequences of the Sussman decision resulted from an incorrect application of section 70(a).
>
> "The court reasoned that the carryback claim could not be an existing property interest at the time the petition was filed because section 172 of the Internal Revenue Code bases carryback refunds upon net operating losses for the taxable year. The bankrupt could not have presented his claim until nearly seven months after his petition was filed. However, his inability to present his claim when the petition was filed should not, in itself, prevent the claim from vesting in the trustee, for it is possible to have an existing interest in property without having an immediate right to en-

joy that property". For example, one who holds a note payable at the end of the year has an existing property interest even though he has no immediate right to collect the debt. * * *"

"The Sussman court's conclusion that the right itself did not come into existence until the end of the taxable year must have been based upon the uncertainty of the claim rather than its immaturity, for the court assumed that the bankrupt could possibly earn enough during the remainder of the year to offset his losses and eliminate the availability of a carryback. Several cases involving claims of far greater uncertainty make it clear that a contingent claim can vest in the trustee. In the leading case of *Williams v. Heard* the bankrupt's award for losses caused by the activities of British-built Confederate cruisers was held to have vested in the trustee even though the bankrupt had no enforceable claim at the time of bankruptcy and it seemed unlikely that he ever would have such a claim. The Court reasoned that the bankrupt did have a right to compensation at the time he was adjudicated a bankrupt even though he then had no remedy. In determining that this particular inchoate claim was sufficiently in existence to vest in the trustee the court relied upon the test laid down by Justice Story in *Comegy v. Vasse.* * * * If the Sussman court had applied this test, it would have found that the carryback claim was an existing property interest; for, if the bankrupt had died at the time the petition was filed, it is clear that his administrator could have claimed the refund for the benefit of the estate."

"The Sussman court further reasoned that, even if the claim was an existing property interest, it was not the type of interest which can be transferred or levied upon, as required for it to vest in the trustee under section 70(a) (5) of the Bankruptcy Act, because the Federal Anti-Assignment Statute forbids the assignment of unallowed claims against the government.

However, the Supreme Court decided in *Erwin v. United States* that the Anti-Assignment Statute does not prevent such claims from vesting in the trustee in bankruptcy."

The author of the article in the magazine cites authorities thus:

"An immature carryback claim was held to be assignable under ch. XI arrangement proceedings in the case of *In re Kepp Elec. & Mfg. Co.*, 98 F. Supp. 51 (D. Minn. 1951). The debtor assigned all his claims for tax refunds to a receiver for the benefit of the unsecured general creditors. * * * There is no apparent reason why a claim which is sufficiently in existence to be assignable under ch. XI proceedings should not be sufficiently in existence to vest in the trustee under §70 (a)."

"Since the *Sussman* case arose in Pennsylvania it may be significant that the Pennsylvania courts have held that contingent remainders are subject to execution and do vest in the remainderman's trustee in bankruptcy. E. G., *In re Packer's Estate*, 246 Pa. 116, 92 Atl. 70 (1914) (bankruptcy); *De Haas v. Bunn*, 2 Pa. 335 (1845) (execution). In the *Dorgan* case, (237 Fed. 507), supra, the court said: 'Such interest is a property right —contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right * * * The trustee, or purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately; but it is a right which should have a value, and, having a value, under the policy of the law, in case of bankruptcy, it passes to the trustee for the benefit of creditors. *The whole policy of the Bankrupt Act is that all nonexempt property of the bankrupt * * * shall be subjected to the payment of the debts of the bankrupt.*' 237 Fed. at 509. (Emphasis added.)"

The general purpose and policy of the Bankruptcy Act, from its incipiency has been, and is that all property of

the bankrupt shall be subject to the payment of his debts. As suggested by the authorities quoted, had the bankrupt died solvent, his legal representative should and would have listed his claim and collected it. Nowhere else could the fund have gone except to his estate, if he had been solvent. Since he is insolvent, it must go to his creditors.

(Signed) T. WHITFIELD DAVIDSON
T. Whitfield Davidson
United States District Judge

Judgment of Court of Appeals

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21043

D. C. Docket No. 4951, 4952 & 4953-Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, BELL, and WRIGHT*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Gerald Segal, Individually and d/b/a Segal Cotton Products, and others, be condemned to pay, in solido, the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 9, 1964

Issued as Mandate: Oct. 23, 1964

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* Of the D. C. Circuit, sitting by designation.

Opinion of the Court of Appeals

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21043

D. C. Docket No. 4951, 4952 & 4953-Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(September 9, 1964.)

Before RIVES, BELL and WRIGHT,* Circuit Judges.

BELL, Circuit Judge: This appeal presents a question of prime importance in the administration of the Bankruptcy Act. At issue is whether loss-carryback refunds forthcoming under the federal income tax statutes[1] and

* Of the D.C. Circuit, sitting by designation.

[1] §172 of the Internal Revenue Code of 1954, 26 USCA, §172.

arising from losses sustained prior to but in the year of bankruptcy go to creditors or the bankrupt.

Gerald Segal and Sam Segal, as individuals, filed voluntary petitions in bankruptcy on September 27, 1961. On the same date Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, filed a voluntary petition in bankruptcy. The trustee here was duly appointed and qualified in all three proceedings.

Segal Cotton Products incurred losses during the year 1961 prior to the filing of the petition on September 21. The trustee filed claims for loss-carryback adjustments with the Internal Revenue Service in light of income taxes having been paid by the individual partners for the two preceding years. Tax refunds were obtained pursuant thereto, and these were the subject matter of claims filed on behalf of Gerald and Sam Segal which were denied by the Referee.[2] The District Court affirmed, holding that the refunds were assets of the trustee for the benefit of creditors. This holding was contrary to that of the Third Circuit, on similar facts, in the case of *In re Sussman*, 3 Cir., 1961, 289 F. 2d 77, and that of the First Circuit in *Fournier v. Rosenblum*, 1 Cir., 1963, 318 F. 2d 525. This appeal followed.

The question presented is whether the rights to the loss-carryback adjustments passed to the trustee. The bankrupts contend that the rights accrued after the date of

[2] The refunds to Gerald Segal were in the amounts of $283.07 on the 1961 loss-carryback to 1960, and $1,608.21 to 1959. The refunds to Sam Segal were in the amount of $505.63 to 1960, and $1,839.41 to 1959.

bankruptcy since applications for refunds, resting as they must on the results of the whole taxable year, could not have been filed until the end of the year. The answer depends on whether such a right to refund or adjustment is transferable property within the meaning of 11 USCA, § 110a(5), § 70a(5) of the Bankruptcy Act, in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *"

It is to be noted that the term "property" as used in this section includes rights of action which could have been transferred prior to the filing of the petition.[3] The court held in *Sussman, supra,* that the right to a loss-carryback adjustment is not property as defined in § 70a; and further, if property, because of the proscription contained in the Assignment of Claims Act, 31 USCA, § 203, it could not have been transferred prior to the filing of the petition in bankruptcy. In *Fournier v. Rosenblum, supra,* the court went only so far as to hold that the right was not embraced in the concept of property as used in § 70a. With deference, and after careful consideration of the reasoning of these

[3] The statute also includes rights of action which could have been levied upon and sold under judicial process, or otherwise seized, impounded or sequestered. In the view we take of the case, any consideration of these qualifications is pretermitted.

respected sister courts, we find ourselves unable to follow their decisions. We hold that the right to a loss-carryback refund or adjustment, although contingent as to amount, is transferable property within the meaning of § 70a(5), and affirm.

We begin with the proposition that it was the intent of Congress to secure to creditors all property of a bankrupt. The refunds here in question will pass to the bankrupts freed from claims of their creditors if such a right is outside the scope of the definition of property as used in the Act. This will be the result in spite of the fact that the refunds arose as a result of losses in the partnership business which in the first place caused the claims of the creditors to come into existence. This windfall to the bankrupts at the expense of the creditors was recognized by the court in *Sussman*, and *Fournier v. Rosenblum*, but each court felt that it was a matter which required legislative correction.

Our conclusion stems from a construction which gives effect to the congressional intent. It is true that the refunds flow from newly created rights in the sense that the loss-carryback provision came into the law in 1942, after the enactment of § 70a(5) in 1898. Moreover, such refunds may not be sought until the end of the taxable year in which the losses arise, and thus the realization of the right is not only deferred but a contingency is posed as to the amount of the loss since conceivably the applicable losses may be reduced or increased after the date of the filing of the petition in bankruptcy.

There is nothing in the language of the statute to indicate that the scope of the definition of property is to be limited to property rights existing when the statute was enacted. This conclusion must be coupled with the fact that the concept of property as used in the Bankruptcy law has been held, over a long period of years, to include rights depending on contingencies. In *William v. Heard*, 1891, 140 U.S. 529, 11 S. Ct. 885, 35 L. Ed. 550, the predecessor bankruptcy statute provided that all of the "estate, debts, and effects" of the bankrupt were to be recovered for the creditors. This was said to embrace his whole property. The facts were that during the Civil War the bankrupts had paid extra insurance premiums to cover war risks created by Confederate ships sponsored by Great Britain. In 1871, the United State secured an international reparations award of 15 million from Great Britain to be distributed by Congress as it saw fit. Congress set up a commission to determine distribution of the fund in 1874, and the bankruptcy occurred in 1875. No steps were taken to recover an award for the extra premiums paid until 1882 when Congress expressly provided for such recovery, and the award was made in 1886. The question was presented of ownership of the award as between the assignee of the bankrupts and them individually, they having been discharged in 1877.[4] The court held that the bankrupts had at the time of bankruptcy a possibility, coupled with an interest, of recovering the premiums, and that such was property

[4] Under the bankruptcy practice then in effect the bankrupts were required to make a conveyance of "all [their] estate, real and personal" to an assignee. This is to be compared with the present practice of all property of the bankrupt passing by operation of law to the trustee.

within the meaning of the Act which had passed to the assignee of the bankrupts.

The case of *In re Dorgan's Estate*, S.D., Iowa, 1916, 237 Fed. 507 involved an Iowa will giving the residue to the wife for life, with "full power to use the same * * * as she may see fit," and at the wife's death, remainder to bankrupt of "all the proceeds * * * left." The petition in bankruptcy was filed during the lifetime of the wife. Under Iowa law, this will created a life estate in the wife, with a vested remainder, subject to divestment, in the bankrupt. The court held that the bankrupt's interest passed to the trustee, saying "Such interest is a property right — contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life."

The case of *Kleinschmidt v. Schroeter*, 9 Cir., 1938, 94 F. 2d 707, presented a situation where the bankrupt was engaged in a joint mining venture, advanced part of his contribution to the venture, but defaulted on the rest. Under the joint venture agreement he thereby forfeited all interest in the venture, except the conditional right to a return of his prior contribution if the venture made a profit or was sold at a profit. The court held that the conditional right of the bankrupt to a return of his contribution passed to the trustee in bankruptcy by operation of § 70a.

See also *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725, which based the passing of an income tax refund claim pend-

ing when the bankruptcy petition was filed on the premise that it was a right of action arising from the unlawful taking or detention of property of the bankrupt within the meaning of § 70a(6) of the Act. And *cf. In re Kepp Elec. & Mfg. Corp.*, D. Minn., 1951, 98 F. Supp. 51, a Chapter XI arrangement proceeding, where the debtor transferred various assets to a receiver, including all tax refunds due and owing the debtor from the United States government. The assignment of loss-carryback claims was prior to the end of the taxable year. The Commissioner of Internal Revenue maintained that the transfer of the refund claim was void as violating the Assignment of Claims Act. It was held that this Act did not apply to assignments which occur through operation of law, and that a Chapter XI transfer to a receiver occurs by operation of law. Apparently no question was presented as to whether the assignment might be invalid because of its being contingent, and there was no contest between the receiver and an assignee as distinguished from the government.

Thus it is that these authorities have considered contingent rights as property under the Bankruptcy Act. They are applicable and persuasive by analogy. We hold that the right to claim loss-carryback refunds under the circumstances of this case is property as that term is used in § 70(a) (5), notwithstanding that the claim is subject to adjustment in the event the taxpayer has other losses or earnings during the balance of the year, and the claim may not be

filed until the end of the taxable year.[5] This right of action springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses, and are available for that purpose to the end of providing the refund. The right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent and this meets the test of a possibility vested with an interest set out in *Williams v. Heard, supra.*[6]

Accepting that the inchoate right to the loss-carryback refund is "property", this leaves for decision whether it is property which the bankrupt "could by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. It is not contended that the contingent and defeasible nature of the refund claim prevents it from being transferable. Contingent property interests are, of course, assignable at common law, *In re Landis*, 7 Cir., 1930, 41 F. 2d 700; *In re Wright*, 2 Cir., 1907, 157 Fed. 554; see also 6 C.J.S. *Assignments* § 12, and as our preceding discussion demonstrates, contingent interests have been held to pass to the trustee in bankruptcy. The bankrupts do contend,

[5] A proration of the refund in the ratio of the losses before and after the filing date would be indicated in the event of losses after the filing date. Earnings after the filing date would simply reduce the amount of the refund to the trustee. The fact that the refund claim is unmatured, in the sense that the taxpayer may not file for it until the end of the taxable year, would not appear to prevent the claim from being "property" within §70a(5). This is an everyday occurrence where notes due and accounts receivable at a future date pass to the trustee in bankruptcy.

[6] The question under consideration has had the attention of the commentators since the *Sussman* decision. See Herzog, Bankruptcy Law, Modern Trends, Journal of the National Association of Referees in Bankruptcy, Vol. 36, p. 18 (January 1962); XVI Univ. of Miami L. Rev. 345 (1961); 119 Univ. of Penn. L. Rev. 275 (1961); 14 Stanford L. Rev. 380 (1962); and 40 Tex. L. Rev. 569 (1962).

however, that since the Assignment of Claims Act, *supra*, renders null and void assignments of claims against the United States, the right to the loss-carryback refund could not be "transferred" under § 70a(5). As heretofore noted, the Third Circuit in *Sussman* accepted this argument as an alternative basis for its holding that the carryback refund did not pass to the trustee.

It is settled law that the passage of title to a claim against the United States from the bankrupt to the trustee is not such a transfer or assignment as is barred by the Assignment of Claims Act. This is the principle enunciated in the *Kepp Elec. & Mfg. Corp.* case, *supra*, of the non-applicability of this Act to transfers effected by operation of law, and is the progeny of *Erwin v. United States*, 1878, 97 U.S. 659, 24 L. Ed. 1065. The point of the reasoning of the *Sussman* case was that the Assignment of Claims Act would, on the other hand, prevent a transfer of the refund right prior to and aside from bankruptcy, thereby rendering the right non-transferable within the meaning of § 70a(5).

It is our opinion however, that this conclusion falls in light of the established law that an assignment of a claim or right against the United States is enforceable between the parties to such assignment, in that the bankrupt and the assignee could have entered into an enforceable contract whereby the bankrupt would have been bound to pay over the refund proceeds once he had received them from the government. *Martin v. National Surety Co.*, 1937, 300 U.S. 558, 57 S. Ct. 531, 81 L. Ed. 822; *California Bank v. United States Fidelity & Guar. Co.*, 9 Cir., 1942, 129 F. 2d 751;

and *Bank of California v. Commissioner*, 9 Cir., 1943, 133 F. 2d 428. Thus, at the date of bankruptcy, the Segals were possessed of a valuable property right, capable of being converted into money value. We feel that this was sufficient transferability to meet the requirement of § 70a(5).

The *Sussman* court relied on *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F. 2d 828, cert. denied, 1957, 355 U.S. 856, 78 S. Ct. 84, 2 L. Ed. 2d 63, and *Wooton v. United States*, Ct. Cl., 1949, 86 F. Supp. 143, cert. denied, 1950, 339 U.S. 903, 70 S. Ct. 517, 94 L. Ed. 1333, in holding that a loss-carryback claim was not transferable. *Ideal* held that an assignment of a claim for refund of customs duties was not enforceable between the parties until the government allowed the claim, and hence that the assignment was not sufficiently "perfected" prior to bankruptcy to prevent it from being a voidable preference under § 60a of the Bankruptcy Act. 11 USCA, § 96a. The court did not deal with the meaning of transferability under § 70a(5), nor did the court suggest that the assignee could not have enforced his assignment once the refund had been paid by the government. The *Wooten* case, as applicable here, established no more than that the Assignment Act bars a direct suit by the assignee against the government.

Finally, we are of the opinion that the argument pressed here, and accepted in *Sussman*, proves too much. If the Assignment of Claims Act defeats the transferability of an inchoate claim for a loss-carryback refund, it should by the same logic render all tax claims against the United States non-transferable for Bankruptcy Act purposes. The Assign-

ment Act would apply with equal force to all claims for tax refund, including those presently due and fixed in amount. They too must meet the transferability prerequisite of § 70a(5). Yet, it is estabilised that the bankruptcy trustee succeeds to any accrued claim or right of action for tax refund the bankrupt may have against the government. 4 Collier, Bankruptcy ¶ 70.28[4], at 1250, and cases cited at note 27.[7] See also *In re Goodson*, S.D. Cal., 1962, 208 F. Supp. 837.

For the foregoing reasons, we hold that an inchoate right to receive a loss-carryback refund is "property", and that it is property which the bankrupt could "by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. Consequently, the refund proceeds belong to the trustee.

AFFIRMED.

[7] Collier cites *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725, which held that a refund claim was a 'right of action * * * [for] the unlawful taking or detention of * * * property' within §70a(6).This subsection contains no transferability requirement. The other cases cited by Collier do not specify whether the refund claim was deemed to pass to the trustee under §70a(5) or under §70a(6). In most tax refund cases, the government is not disputing that the taxpayer is entitled to return of the overpayment. Consequently, the 'unlawful * * * detention of * * * property' language of §70a(6) seems inappropriate, and such claims fall more comfortably within the general language of §70a(5).

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B-23

Order Denying Petition for Rehearing in the Court of Appeals

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21043

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

v.

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(October 12, 1964)

Before RIVES, BELL, and WRIGHT,* Circuit Judges:

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

Petition for Rehearing filed: 9-30-64

Petition for Rehearing denied: 10-12-64

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* Of the D. C. Circuit, sitting by designation.

APPENDIX C

CONFLICTING OPINIONS

In the Matter of David SUSSMAN and Charles Sussman, individually and as co-partners, trading as Charles Company, Bankrupts.

Melvin Talus, John T. Durnin and Harry S. Mayer, Trustees, Appellants.
No. 13398.

United States Court of Appeals
Third Circuit.

Argued Feb. 7, 1961.
Decided April 3, 1961.

HASTIE, Circuit Judge.

The bankrupt, Charles Sussman, was a partner in a business which sustained heavy losses in the early months of 1956. Sussman individually, as well as the partnership, filed a petition in bankruptcy on June 7, 1956.

For the calendar years 1954 and 1955, Sussman had paid income taxes pursuant to joint returns filed by him and his wife. Mrs. Sussman had no income. The 1956 business reverses, which caused Sussman's bankruptcy in June, also resulted, at the end of the year, in a situation in which a proper income tax return for the calendar year would show a substantial net loss. Accordingly, in March, 1957, the trustee in bankruptcy filed an application on behalf of the bankrupt for a tentative carryback adjustment for the years 1954 and 1955 as justified by the bankrupt's demonstrated substantial

net operating loss for the calendar year 1956. In July, 1957, this claim was allowed and a refund check was delivered to the trustee. Thereafter, the bankrupt and his wife sought in the bankruptcy proceeding to compel the trustee to surrender this refund to them. The referee so directed and the district court affirmed the referee's order. This appeal followed.

The controlling provisions of the Bankruptcy Act appear in Section 70, sub. a, 11 U.S.C.A. §110, sub. a. That section provides, in relevant part,[1] as follows:

> "(a) The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * *."

It is not disputed that the "rights of action" which pass to the trustee under the above quoted language of Section

[1] In the court below there seems to have been some consideration of other provisions of Section 70, sub. a, particularly the provisions added to Section 70, sub. a by the Chandler Act to prevent windfalls to a bankrupt during the months immediately after bankruptcy. But those provisions, as they appear in clause (7) of Section 70, sub. a and in the unnumbered paragraphs at the end of the section, do not cover the present situation. They embrace, first, contingent interests in real estate which become assignable by the bankrupt within six months after bankruptcy; second, bequests, devises and inheritances which vest in the bankrupt within six months after bankruptcy; and, third, any property, held in estate by the entirety and vested in the bankrupt and another at the time of bankruptcy, which within six months thereafter becomes transferable by the bankrupt alone. The present case obviously is not within either the first or the second category. The third category does not embrace the present claim because the spouses had no vested right to a refund when the bankruptcy petition was filed.

70, sub. a include accrued and immediately determinable and enforceable claims for tax refunds or rebates which the bankrupt himself had or could have asserted against the United States at the time his petition in bankruptcy was filed. *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725; cf. *Hoffman v. United States*, D.C.S.D. N.Y. 1940, 32 F. Supp. 939. But in this connection it is important to keep in mind that such a right of action for a tax refund is created and defined by the statutes in which the United States authorizes a taxpayer to assert such a claim. In the present situation the statutory basis of a loss carry-back claim, as the court below has properly pointed out, is a taxpayer's economic experience for a unit of time, an entire taxable year. This is clear because the net operating loss upon which any claim for a carry-back must be based is the excess of allowable deductions over the taxpayer's gross income as computed in a tax return for a taxable year. Int. Rev. Code §172 (c), 26 U.S.C.A. §172(c). Thus, the statutory scheme precludes the existence of any carry-back claim until the end of a taxable year.

It has already been stated that Sussman's taxable year was the calendar year. There is no provision in law that bankruptcy terminates a taxable year. Therefore, when Sussman filed his bankruptcy petition he had no "right of action" against the United States for the trustee to acquire under Section 70, sub. a(5) or (6).

More generally, paragraph 70 sub. a(5) provides that the trustee shall acquire the "title" of the bankrupt to all "property" which is subject to assignment by the bankrupt or levy against him when the petition is filed. Of course,

this concept of "title" to "property" connotes an ownership interest in some res, whether that res shall be corporeal property or a chose in action. In June, 1956, Sussman may well have contemplated the likelihood that he would be able to assert a loss carry-back claim against the United States within a few months. But he could point to no existing fund and to no existing cause of action in which he had any legal or equitable interest.

Perhaps this June expectation that a right to a refund would arise six or seven months later can be described as a contingent claim against the United States. But no such formulation can enlarge or in any way alter the limiting terms and conditions upon which the sovereign has agreed to recognize such a claim. The United States has not agreed that such a contingent claim against it can be assigned or attached, as Section 70, sub. a(5) requires. Rather, the transferability of claims against the United States has been narrowly restricted by the Assignment of Claims Act, 31 U.S.C.A. §203. Certainly, in June, 1956, Sussman's expectation of a future claim against the government was not assignable, even as between Sussman and any assignee. Cf. *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F. 2d 828, certiorari denied 1957, 355 U.S. 856, 78 S. Ct. 84, 2 L. Ed. 2d 63; *Wooton v. United States*, 1949, 86 F. Supp. 143, 114 Ct. Cl. 608, certiorari denied 1950, 339 U.S. 903, 70 S. Ct. 517, 94 L. Ed. 1333.

We find the conclusion inescapable that in June, 1956 Sussman had no right of action against the United States and no vested or transferable property in his anticipated

claim against the United States, within the meaning of Section 70, sub. a of the Bankruptcy Act. The unfortunate result of this is, as the referee pointed out, "a windfall to the bankrupt at the expense of the creditors". The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution.

The judgment will be affirmed.

Henry FOURNIER, Appellant,

v.

Miriam G. ROSENBLUM, Trustee,
Appellee.

In the Matter of Henry FOURNIER,
d/b/a Henry's Men's Wear,
Bankrupt.

No. 6091.

United States Court of Appeals
First Circuit.

June 12, 1963.

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

WOODBURY, Chief Judge.

The appellant, Henry Fournier, to be referred to hereinafter as the bankrupt, paid income taxes for the calendar years 1958 and 1959 pursuant to joint returns filed by him and his wife. In 1960 he suffered financial reverses and on December 6 of that year he filed a voluntary petition in bankruptcy with the clerk of the United States District Court for the District of New Hampshire. The first meeting of creditors was held on December 21, 1960, when the appellee's predecessor was appointed trustee.

On June 8, 1961, the bankrupt and his wife filed their joint income tax return for the calendar year 1960 and with

their return filed application for a tentative carryback adjustment of their taxes for the years 1958 and 1959 based on the bankrupt's net operating loss for the calendar year 1960. The bankrupt's claim was allowed on June 29, 1961, and he received a refund check from the United States in the amount of $2,800.52. The bankrupt's wife disclaimed any interest in the amount of this refund but his trustee in bankruptcy claimed it and filed a petition in the bankruptcy proceeding for an order directing the bankrupt to turn the amount of the refund over to her for the benefit of creditors. The Referee so directed, the United States District Court for the District of New Hampshire affirmed without opinion and this appeal followed.

This case is on all fours with *In re Sussman*, 289 F. 2d 76 (C.A. 3, 1961), in which the court regretfully held for the bankrupt. A factual difference between that case and this is that in *Sussman* the petition was filed about the middle of the bankrupt's taxable year in which he suffered his recoupable loss, whereas in this case the petition was filed toward the end of that year.[1] Thus in *Sussman* there was a longer period of uncertainty whether the bankrupt's loss would survive to the end of the calendar and his taxable year. Nevertheless, in this case as in that, the prospective loss deduction was subject to an element of uncertainty and incalculability at the time the petition in bankruptcy was filed. The difference is merely one of degree. The question in both cases is whether the bankrupt's ex-

[1] The cases also differ quite immaterially in that in Sussman the trustee applied for and received the loss carryback refund and the bankrupt sought to recover it from the trustee, whereas here the situation is reversed.

pectancy as of the date of the filing of his petition in bankruptcy of a net loss carryback refund constituted either "property" or a "right of action" within the meaning of § 70, sub. a(5) and (6) of the Bankruptcy Act as it now stands. 52 Stat. 880, 11 U.S.C. § 110, sub. a(5) and (6). The immediate question for us is whether or not to follow the Third Circuit in the *Sussman* case.

Section 70, sub. a(5) and (6) insofar as material provides:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; * * *".

Obviously the critical date is the date of the filing of the petition in bankruptcy and equally obviously what vests by operation of law in the trustee in bankruptcy as of that date is the bankrupt's "title" to "property" or "rights of action." The first and basic inquiry, therefore, is whether the bankrupt's prospective, indeed expectant, right to a net loss carryback refund falls into either one of these categories. We think it does not.

Since the provision of the Internal Revenue Code of 1954 authorizing net operating loss carrybacks (§ 172) does so

on the basis of the taxpayer's experience for a taxable year, the right to a loss carryback refund does not arise until the end of the taxable year in which the loss occurs. Thus it cannot be said that a bankrupt's losses create a right to a carryback as soon as they occur, even though the right be unenforceable until the end of the bankrupt taxpayer's accounting period, for it is evident that a taxpayer who sustains a net operating loss for a portion of his taxable year may earn or acquire, as by winning a large bet or holding a winning sweepstakes ticket, enough income during the balance of the year to offset or reduce his loss. As the court pointed out in *Sussman*, 289 F. 2d at page 77, "* * * the statutory scheme precludes the existence of any carry-back claim until the end of a taxable year." Therefore no claim, but only a prospect or expectation of a claim, to a net loss carryback refund can arise until the end of a taxable year, and the prospect, hope or expectation of a claim is not a right of action.[2]

Nor is the prospect that a right of action may arise "property." For, again as the court pointed out in *Sussman* (289 F. 2d at page 78), the concept of "title" to "property" connotes a definable ownership interest in some res, whether that res be corporeal property or a chose in action. Here, however, there was no res or chose in action in existence on the date of the filing of the petition in bankruptcy. At that time the bankrupt could point to no existing fund and to no existing right in which he had any legal or equitable interest.

[2] *A fortiori*, there is no "right of action" of the types specifically enumerated in §70, sub. a(6) of the Act.

Since we hold that the bankrupt's prospective claim was neither "property" nor a "right of action" within the meaning of § 70, sub. a(5) of the Act, we do not need to consider whether that prospective claim could by any means be transferred by him or levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered, in conformity with the further requirements of that subsection of the statute.

We regret this result as much as did the court in *Sussman*. But, as in *Sussman*, we think the remedy lies with Congress.[3]

The order of the District Court is vacated and the case is remanded to that Court for further consistent proceedings.

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[3] Legislative action might consist in amending the Internal Revenue Code to provide that bankruptcy, like death, terminates the taxable year. Or it might consist in further amendment of §70, sub. a of the Bankruptcy Act along the lines of the 1938 amendment of that section by the Chandler Act, 52 Stat. 879, to correct a similar statutory deficiency with respect to contingent interests in property. See In re Baker, 13 F. 2d 707, (C.A. 6, 1926), cert. denied; Shoun v. Baker, 273 U.S. 733, 47 S. Ct. 242, 71 L. Ed. 864 (1926); Dioguardi v. Curran, 35 F. 2d 431 (C.A. 4, 1929).